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09/853,428	05/10/2001	George Brainard	BRA01-NP002	6772
44321	7590	05/07/2007	EXAMINER	
PATRICIA A. WENGER			GIBSON, ROY DEAN	
201 NORTH JACKSON STREET			ART UNIT	PAPER NUMBER
MEDIA, PA 19063			3739	
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PATRICIA A. WENGER
201 NORTH JACKSON STREET
MEDIA PA 19063

In re Application of:
BRAINARD, GEORGE

Serial No.: 09/853,428

Filed: May 10, 2001

Docket: BRA01-NP002

Title: PHOTORECEPTOR SYSTEM FOR
MELATONIN REGULATION AND
PHOTOTHERAPY

DECISION ON
RECONSIDERATION of
LETTER RESTARTING
PERIOD of RESPONSE

Mailed Nov. 7, 2003

This is a decision in response to the decision rendered by the Office of Petitions on Jan. 30, 2007 to answer the Request for Reconsideration of Letter Restarting Period of Response mailed Nov. 7, 2003. The Request is currently considered pursuant to 37 CFR 1.181, and no fee is required.

The Request for Reconsideration is **DISMISSED**.

On Aug. 1, 2006, petitioner filed the Reconsideration of Letter Restarting Period of Response mailed Nov. 7, 2003. In the Reconsideration, petitioner requests the Office to withdraw the entry of the amendment filed earlier on Jul. 7, 2003. Petitioner believes that such amendment filed on Jul. 9, 2003 was not needed and further requests the examiner to re-send the original Office action based on the originally filed claims 1-19.

The record shows that:

- 1) On Jun. 6, 2002, the examiner issued a non-final Office action.
- 2) On Dec. 10, 2002, a Notice of Abandonment was mailed for failure to respond to the Jun. 6, 2002 Office action.
- 3) On Jan. 21, 2003, petitioner filed a petition to revive based on non-receipt of the Office action mailed Jun. 6, 2002
- 4) On Feb. 4, 2003, a decision to dismiss the petition filed on Jan. 21, 2003 was mailed because there was insufficient showing of non-receipt of the non-final Office action mailed Jun. 6, 2002.
- 5) On Jul. 9, 2003, petitioner filed a Further Petition accompanying with evidence of non-receipt of Office action of Jun. 6, 2002. A fully responsive amendment to the Office action of Jun. 2, 2002 was also filed on Jul. 9, 2003. In order to do so,

- presumably the applicant obtained a copy of the missing Office action of Jun. 2, 2002.
- 6) On Jul 31, 2003, the Office of Petitions dismissed the petition again for failure to satisfy the requirements of 37 CFR 1.137(a).
 - 7) Petitioner filed a renewed petition on Sep. 24, 2003 and supplied the missing documents as required in the decision of Jul. 31, 2003.
 - 8) Sep. 30, 2003, Offi-e of Petitions granted the Further Petition filed on Jul. 9, 2003. The application was revived.
 - 9) On Oct. 24, 2003, the examiner re-mailed the non-final Office action of Jun. 2, 2002 without treating the amendment filed on Jul. 9, 2003.
 - 10) A few days later, on Nov. 7, 2003, the examiner realized that an amendment filed on Jul. 9, 2003 was overlooked and issued a supplemental non-final Office action.
 - 11) On Nov. 10, 2003, the applicant mailed a Letter to Examiner and requested the examiner to treat the amendment filed Jul. 9, 2003 with a certificate of mailing date of Nov. 6, 2003.
 - 12) In response to the examiner non-final Office action of Nov. 7, 2003, the applicant on May 10, 2004, filed a Notice of Appeal with three months extension of time.
 - 13) On Jul. 22, 2004, the application became abandoned for failure to file appeal brief.
 - 14) On Aug. 1, 2006, Petitioner filed Supplemental Amendment, Petition and Fee to add Originally Erroneously Named Inventors in Declaration (37 CFR 1.48(a); Request for Continued Examination; Petition to revive under 37 CFR 1.137(b); and Request for Reconsideration of Letter Restarting Period of Response mailed Nov. 7, 2003.
 - 15) On Jan. 30, 2007, the Office of Petitions rendered a decision to defer the ruling on the petition to revive and request the TC 3700 to answer the Reconsideration of Letter Restarting Period of Response mailed Nov. 7, 2003 filed on Aug. 1, 2006.

Discussion and Analysis

In the Request for Reconsideration of Letter Restarting Period of Response mailed Nov. 7, 2003 filed on Aug. 1, 2006, petitioner alleges and requests that a. the July 7, 2003-filed amendments, remarks and arguments in conjunction with a Petition to Revive an abandoned application were not needed and should not have been entered on September 30, 2003; b. On Nov. 10, 2003 (mailed on Nov. 6, 2003) Applicant filed a Letter to Examiner noting that the Jul. 9, 2003 amendments (mailed by applicant on July 7, 2003), remarks and arguments in conjunction with a Petition to Revive an abandoned application should have been entered on September 30, 2003. However, the July 7, 2003-filed amendments, remarks and arguments in conjunction with a Petition to Revive an abandoned application were not needed and should not have been entered on September 30, 2003; c. Applicants request that the Jul. 9, 2003 amendments (mailed by applicant on July 7, 2003), remarks and arguments in conjunction with a Petition to Revive an abandoned application not be entered; and alternatively, if they were entered, for them to be withdrawn. Petitioner also alleges that the miscellaneous letter of Nov. 10, 2003 (mailed by the applicant on Nov. 6, 2003) and the supplemental non-final Office action were crossed in the

mail. Therefore, it is alleged that the restarting of the action did not occur. Now, petitioner requests that the original office action with 19 pending claims to be re-sent.

Petitioner's request of resending the original Office action with 19 pending claims cannot be granted because the original Office action with 19 claims pending was in fact re-mailed on Oct. 24, 2003 pursuant to the decision rendered by the Office of Petitions on Sep. 30, 2003. Due to the examiner's inadvertence of failure to treat the amendment filed on Jul. 9, 2003, the examiner issued a supplemental complete non-final Office action on Nov. 7, 2003. This action clearly restarted a new period to response. Petitioner now requests that the entry of the amendment filed on Jul. 9, 2003 be removed because the amendment was not needed and should not have been entered. Petitioner did not specify why the amendment was not needed and did not provide any reasons as to why the amendment filed on Jul. 9, 2003 should not have been entered. Petitioner mentions that the miscellaneous letter of Nov. 10, 2003 (mailed by the applicant on Nov. 6, 2003) and the supplemental non-final Office action of Nov. 7, 2003 were crossed in the mail. That the letters crossed in the mail is not probative. Further, petitioner does not explain why her specific request for entry and treatment of this amendment in her Nov. 10, 2003 letter is now deemed to have been in error. The Jul. 9, 2003 amendment was already in the file and entered after it was filed. On page one of the Jul. 9, 2003 amendment, the applicant clearly stated that the amendment is "In response to the Office Action of June 6, 2002, please amend the above-identified application as follows". Therefore, the amendment was properly entered at the applicant's request. The request to remove the entry the amendment filed on Jul. 9, 2003 cannot be granted.

It is also noted that in the Request for Reconsideration of Letter Restarting Period of Response mailed Nov. 7, 2003 filed on Aug. 1, 2006, petitioner did not mention that in response to the non-final Office action mailed on Nov. 7, 2003, a notice of appeal was filed on May 10, 2004. This is a clear indication that the applicant intended to further pursue the twice rejected claims 1-3, 5, 6, 11-15 and 17 through appeal process pursuant to 35 USC 134 and M.P.E.P. 1204. Therefore, the notice of appeal is deemed to be a proper response to the non-final Office action mailed on Nov. 7, 2003. Moreover, on Aug. 1, 2006, petitioner filed the current petition to revive the application based on unintentional abandonment under 37 CFR 1.137(b) with a Request for Continued Examination (RCE). The filing of RCE is deemed proper under 37 CFR 1.114 because the application is under appeal.

Finally, Review of the record shows that the Request for Reconsideration of Letter Restarting Period of Response mailed Nov. 7, 2003 was filed on Aug. 1, 2006 which is almost 33 months after the mailing date of the supplemental non-final Office action mailed on Nov. 7, 2003. Pursuant to 37 CFR 1.181(f), the petition is not timely filed since the petition was not filed within two months of the action complained of. As the petition was not timely filed, the relief requested will not be granted. Petitioner is entitled to request reconsideration of this decision provided that the request for reconsideration is filed within two months of the date of this decision.

Conclusion

For the foregoing reasons, the relief requested by petitioner will not be granted. The file is being forwarded to the office of Petitions for consideration of a decision on petition to Revive an Unintentional Abandoned Application Under 37 C.F.R. 1.137(b).

PETITION DISMISSED



Frederick R. Schmidt, Director
Technology Center 3700